February 2003

MJI Publications Updates

Juvenile Traffic Benchbook

Sexual Assault Benchbook

Traffic Benchbook--Revised Edition, Vol. 1

Traffic Benchbook--Revised Edition, Vol. 2

February 2003

Update: Juvenile Traffic Benchbook

CHAPTER 5

Dispositional Hearings

5.9 Allocation of Driver's License Clearance Fees

Replace the entire paragraph under Section 5.9 on p 5-8 with the following language:

> Effective January 1, 2003, 2002 PA 741 amended MCL 257.321a(8)(b) and increased the driver's license clearance fees from $25.00 to $45.00. If a juvenile is required to pay this $45.00 fee, the court must, under MCL 257.321a(11)(a)-(c), distribute the fee as follows:
>
> - $15.00 to the Secretary of State;
> - $15.00 to the local funding unit; and
> - $15.00 to the Juror Compensation Reimbursement Fund.

CHAPTER 8

Procedure for Civil Infractions

8.39 License Suspension

Insert the following language at the end of Section 8.39 on p 8-44:

Effective January 1, 2003, 2002 PA 741 amended MCL 257.321a(8)(b) and increased the driver's license clearance fees from $25.00 to $45.00. Under MCL 257.321a(11)(a)-(c), the court must distribute this new $45.00 fee as follows:

- $15.00 to the Secretary of State;
- $15.00 to the local funding unit; and
- $15.00 to the Juror Compensation Reimbursement Fund.

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CHAPTER 2

The Criminal Sexual Conduct Act

2.5 Terms Used in the CSC Act

I. "Force or Coercion"

1. Actual Application of Physical Force or Physical Violence

Insert the following language at the end of Section 2.5(I)(1) on p 70:

> In *People v Alter*, ___ Mich App ___ (2003), the Court of Appeals found sufficient evidence of the actual application of physical "force" under CSC II (force or coercion), where the defendant-therapist, during a therapy session with the victim, unbuttoned the victim's blouse, fondled her breast, and placed her hand on his penis—all without obtaining consent. Alternatively, the Court found sufficient evidence of "coercion," since "the defendant, as the victim's therapist, engaged in sexual contact with the victim through the use of an unethical or unacceptable manner of treatment."

CHAPTER 2

The Criminal Sexual Conduct Act

2.5 Terms Used in the CSC Act

I. "Force or Coercion"

4. Medical Treatment or Examination in a Manner Medically Recognized as Unethical or Unacceptable

Insert the following language at the end of Section 2.5(I)(4) on p 73:

In *People v Alter*, ___ Mich App ___ (2003), the Court of Appeals upheld defendant's two CSC II (force or coercion) convictions, rejecting his sufficiency of the evidence attacks.* In *Alter*, the facts adduced at trial established that defendant, in his capacity as a therapist, counseled the victim for approximately ten years, from 1984 to 1994, regarding issues of alcoholism, depression, eating disorders, nervous breakdowns, marital infidelity, and so-called "failures" in life. During two therapy sessions (on January 9, 1993 and May 5, 1993), defendant fondled the victim's breast and placed her hand on his penis. The therapy sessions continued but were switched, at defendant's request, to the evenings and at hotels, where during the last four to five years of therapy the defendant met with the victim once a week to have sex with her. He claimed the victim's "failures" in life stemmed from her inability to make men happy. The victim "totally trusted" defendant but denied any romantic feelings toward him. After discontinuing therapy with the defendant, the victim still continued to see him "until she reported [his] conduct to the state police and licensing agency." On appeal, defendant argued, among other things, insufficiency of the evidence to sustain his two CSC II (force or coercion) convictions. The Court of Appeals disagreed, finding sufficient evidence on two elements of the "force or coercion" definition: (1) where the actor overcomes the victim through the actual application of physical force or physical violence; and (2) where the actor engages in unethical or unacceptable medical treatment of the victim:

> "Contrary to defendant's claim, there was sufficient evidence to convict him of the two charged counts of CSC II under MCL 750.520c(1)(f) [sexual contact by force or coercion and personal injury]. With respect to the charged conduct of May 5, 1993, the victim testifed that while she and defendant were discussing her husband's verbal abuse during their session, defendant unbuttoned her blouse and began fondling her breast. She further testified that while

*The jury also convicted defendant of two counts of sexual intercourse under the pretext of medical treatment, MCL 750.90, but the Court of Appeals reversed these convictions, finding, contrary to the trial court's opinion, that they are not lesser included offenses of CSC I.

fondling her breast, he placed her hand on his penis and told her that if she would leave her husband she would not feel so 'trapped.' The victim denied ever giving defendant permission to have such sexual contact with her. This was sufficient evidence that defendant used actual force to accomplish sexual contact. . . . Alternatively, the coercion element was satisfied because defendant, as the victim's therapist, engaged in sexual contact with the victim through the use of an unethical or unacceptable manner of treatment. . . .

"As to the charged conduct occurring on January 9, 1993, the victim testifed that while again fondling her breast as the two talked during a session, defendant took her hand and placed it on his penis, then moved her hand about his genitals in a manner causing her to fondle his penis. The victim denied that she gave defendant permission to fondle her breast or have her fondle his penis. As with the evidence concerning the previously discussed conduct, this was sufficient evidence that defendant used actual force or an unethical or unacceptable manner of treatment to accomplish sexual contact." *Id*. at ___. [Citations omitted.]

CHAPTER 2

The Criminal Sexual Conduct Act

2.5 Terms Used in the CSC Act

R. "Personal Injury"

4. "Causation" of "Personal Injury"

Insert the following text at the end of Section 2.5(R)(4) on p 94:

> Relying on *Brown*, *supra* [*People v Brown*, 197 Mich App 448, 451 (1992)], the Court of Appeals in *People v Alter*, ___ Mich App ___ (2003), upheld the following supplemental jury instruction in a CSC II case where the defendant, as the victim's therapist, fondled the victim's breasts and placed her hands on his penis during therapy sessions:
>
> > "[T]he prosecution does not have to show that defendant's conduct was the only cause of the complainant's mental anguish. If you find that the complainant was especially susceptible to the injury at issue, the special susceptibility does not constitute an independent cause freeing defendant from guilt. The prosecution has sustained its burden of proof if you find that defendant was the cause of at least part of the victim's total injury." *Id*. at ___.
>
> Because defendant did not object to the foregoing supplemental instruction at trial, the Court found no plain error by the trial court when it incorporated this supplemental instruction with other jury instructions on personal injury/mental anguish contained in CJI2d 20.9(2) and (3). *Id*. at ___.

CHAPTER 2

The Criminal Sexual Conduct Act

2.6 Lesser-Included Offenses Under the CSC Act

C. Appellate Court Determination of Lesser Included Offenses

Insert the following bullet at the end of Section 2.6(C) on p 111:

F *People v Alter*, ___ Mich App ___, ___ (2003) (sexual intercourse under pretext of medical treatment, MCL 750.90, is not a necessarily included lesser offense of either CSC I, MCL 750.520b(1)(f)(i) [sexual penetration by force or coercion, i.e., overcoming victim through actual application of physical force, and personal injury], or CSC I, MCL 750.520b(1)(f)(iv) [sexual penetration by force or coercion, i.e., engaging in unethical or unacceptable medical treatment recognized as unethical or unacceptable, and personal injury]).

CHAPTER 3

Other Related Offenses

3.15 Gross Indecency – Between Males, Between Females, and Between Members of the Opposite Sex

D. Pertinent Case Law

3. "Public" or "Private" Place

Insert the following language after the second full paragraph in subsection 3.15(D)(3) on p 159:

> A rented hotel or motel room is not a "public place." See *People v Favreau*, ___ Mich App ___ (2003), where the Court of Appeals reversed defendant's disorderly conduct conviction under MCL 750.167(1)(e), because defendant created the objectionable noise from within his hotel room, which, under *Lino*, *supra* [*People v Lino*, 447 Mich 567 (1994)], is not a "public place": "[E]ven if *Lino* stands for the proposition that 'public place' is generally given a broad definition, it also clearly stands for the proposition that a hotel or motel room is not a public place." *Favreau*, at ___. In so doing, the Court expressly rejected as insufficient the prosecutor's argument that defendant created noise that spilled into a public place. *Id*. at ___.

CHAPTER 3

Other Related Offenses

3.16 Indecent Exposure

D. Pertinent Case Law

3. Indecent Act Need Not Be Witnessed

Insert the following language at the end of subsection 3.16(D)(3) on p 162:

> A rented hotel or motel room is not a "public place." See *People v Favreau*, ___ Mich App ___ (2003), where the Court of Appeals reversed defendant's disorderly conduct conviction under MCL 750.167(1)(e), because defendant created the objectionable noise from within his hotel room, which, under *Lino*, *supra* [*People v Lino*, 447 Mich 567 (1994)], is not a "public place": "[E]ven if *Lino* stands for the proposition that 'public place' is generally given a broad definition, it also clearly stands for the proposition that a hotel or motel room is not a public place." *Favreau*, at ___. In so doing, the Court expressly rejected as insufficient the prosecutor's argument that defendant created noise that spilled into a public place. *Id*. at ___.

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Update: Traffic Benchbook – Revised Edition, Volume 1

CHAPTER 1

Required Procedures for Civil Infractions

1.43 License Suspension

Insert the following language at the end of Section 1.43 on p 1-48:

> Effective January 1, 2003, 2002 PA 741 amended MCL 257.321a(8)(b) and increased the driver's license clearance fees from $25.00 to $45.00. Under MCL 257.321a(11)(a)-(c), the court must distribute this new $45.00 fee as follows:
>
> - $15.00 to the Secretary of State;
> - $15.00 to the local funding unit; and
> - $15.00 to the Juror Compensation Reimbursement Fund.

CHAPTER 2

Civil Infractions

2.4 Parking, Stopping, or Standing

G. Civil Sanctions for Parking, Stopping, or Standing Violations

1. Standard civil sanctions for parking, stopping, or standing violations

Insert the following language at the end of Section 2.4(G)(1) on p 2-14:

> On leased vehicles, the leasing company may be held vicariously liable under MCL 257.675c(1) as "the person in whose name that vehicle is registered . . . at the time of the violation" for parking violations incurred by its lessees. However, the leasing company is authorized under MCL 257.675c(3) to recover damages from the individual who *actually* illegally parked the vehicle or to indemnify itself in a written agreement, i.e., the lease. See *Ford Motor Credit Company v City of Detroit*, ___ Mich App ___ (2003), where the Court of Appeals affirmed the trial court's granting of summary disposition in favor of the City of Detroit after it attempted to collect approximately $861,000 in unpaid parking fines from the Ford Motor Credit Company, the lessor of Ford Motor Company leased vehicles involved in approximately 22,000 parking violations.

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CHAPTER 2

Procedures in Drunk Driving and DWLS Cases

2.13 Failures to Appear in Court or to Comply with a Judgment

B. License Suspension

3. Duration of Sanction

Replace the second bullet in Section 2.13(B)(3) on p 2-76 with the following bullet:

- The person has paid the court a $45.00* driver license clearance fee for each failure to answer a citation or failure to pay a fine or cost. Under MCL 257.321a(11)(a)-(c), the court must distribute this new $45.00 fee as follows:

  (1) $15.00 to the Secretary of State;

  (2) $15.00 to the local funding unit; and

  (3) $15.00 to the Juror Compensation Reimbursement Fund.

*Effective January 1, 2003, 2002 PA 741 amended MCL 257.321a(8)(b) and increased the driver license clearance fees from $25.00 to $45.00.

CHAPTER 3

Section 625 Offenses

3.4 OUIL/OUID/UBAC/OWI Causing Death of Another – §625(4)

A. Elements of Offense

5. By the operation of the vehicle, the defendant caused the death of another person.

- Double Jeopardy

  Insert the following language at the end of this subsection:

  > A conviction of both second-degree murder under MCL 750.317 and OUIL causing death under Vehicle Code §625(4) is not violative of state or federal double jeopardy provisions. *People v Werner*, ___ Mich App ___, ___(2002).

- Distinguishing Requisite Intent for Second-degree Murder and OUIL Causing Death

  Insert the following language at the end of this subsection:

  > In *People v Werner*, ___ Mich App ___ (2002), the Court of Appeals reaffirmed the principle articulated in *Goecke*, *supra* [*People v Goecke*, 457 Mich 442, 464-465 (1998)], that extreme intoxication does not necessarily require proof that the defendant was "subjectively" aware of the risk created by his or her conduct. In *Werner*, the defendant was convicted of second-degree murder and OUIL causing death after becoming seriously intoxicated and driving his pick-up truck the wrong direction on a freeway and colliding with a Jeep, killing the passenger and seriously injuring the driver. During the trial, the prosecution showed that defendant was not only extremely intoxicated but that he also knew, from a recent incident, that if he drank alcohol he could experience a black-out and drive recklessly and irresponsibly. On appeal, relying on dicta in *Goecke*, defendant claimed that the trial court erred in denying his motion for directed verdict because there was insufficient evidence to support his second-degree murder conviction. Specifically, defendant argued that since he was seriously intoxicated and since this was a "highly unusual case," the prosecutor was required to prove that he

was "subjectively" aware of the risk of death or great bodily harm. The Court of Appeals disagreed, holding:

> "*Goecke* did not expressly prescribe a subjective analysis for malice in cases of extreme intoxication. . . . [T]he Court recognized that, theoretically, a 'highly unusual case' may require a determination of whether the defendant was subjectively aware of the risk his conduct created, such as where the defendant was 'more absent-minded, stupid or intoxicated than the reasonable man.' . . . This is not the same as stating, as defendant suggests, that plaintiff should have been held to a higher standard of proof of intent because defendant was so severely intoxicated. If defendant's argument is correct, it would mean that moderately intoxicated drivers could be tried for and convicted of second-degree murder while severely intoxicated drivers would be excused because they were too intoxicated to know what they were doing. This would be contrary to the *Goecke* Court's statement that 'malice requires egregious circumstances.' . . . It also would effectively create for some defendants an intoxication defense to second-degree murder, which would be plainly contrary to the *Goecke* Court's holding that voluntary intoxication is not a defense to a second-degree murder charge. . . . Accordingly, an advanced state of voluntary intoxication is not sufficient to qualify as the sort of 'unusual case' that requires a subjective determination of awareness under *Goecke*." *Werner*, *supra* at ___. [Citations omitted.]

In concluding that the trial court did not err in denying defendant's motion for directed verdict, and that there was sufficient evidence to support his second-degree murder conviction, the Court held that this was "not a case where a defendant merely undertook the risk of driving after drinking." *Id*. at ___. Instead, the Court found that "[d]efendant knew, from a recent prior incident, that his drinking did more than simply impair his judgment and reflexes. He knew that he might actually become so overwhelmed by the effects of alcohol that he would completely lose track of what he was doing with his vehicle. If defendant knew that drinking before driving could cause him to crash on boulders in front of a house, without any knowledge of where he was or what he was doing, he knew that another drunk driving episode could cause him to make another major mistake, one that would have tragic consequences." *Id*.